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NO. - - - - - - - -

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHARD, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Apellants,

-vs-

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

On Appeal from the
Supreme Court of Florida

APPELLEES' MOTION TO DISMIS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the federal questions were not timely and properly raised and were not expressly passed on by the Supreme Court of Florida, that the only federal question raised does not present a substantial federal question, and that the appeal was not taken in confirmity with the Rules of the Supreme Court of the United States.

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III. PROCEEDINGS BELOW

The plaintiffs[1] brought this action in the Circuit Court in and for Leon County, Florida, challenging Fla. Stat. §944.485 (Supp. 1978), which requires, as a condition of parole eligibility, that inmates disclose their assets and income, and that they be assessed the cost of their subsistence in prison, subject to the inmate's ability to pay and certain specified exemptions. The plaintiffs' pro se complaint stated that their challenge was based upon the United States and Florida Constitutions. Appendix to Appellees' Motion to Dismiss or Affirm, hereinafter cited as "Appellees' App.",

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[1]For the body of this motion, the parties will be referred to by their appellation in the trial court. The appellants were the plaintiffs below, the appellees, the defendants.

at A1-A20. The Leon County Circuit Court, while not specifically mentioning either the federal or state constitutions or citing any cases construing either document, upheld the constitutionality of §944.485. Ivory v. Wainwright, (Leon County Cir. Ct. June 18, 1979), Appendix to Appellants' Jurisdictional Statement, hereinafter cited as "Appellants' App.", at 22-24.

On direct appeal to the Supreme Court of Florida, the plaintiffs were represented by counsel. In the statement of questions presented in their brief on the merits, they challenged §944.485 on the following grounds: (1) that it invades their right to privacy as protected by the First and Fourteenth Amendments to the U.S. Constitution; (2) that it is an

ex post facto law contrary to Article I, §10 of the Florida Constitution; (3) that it deprives inmates of property and liberty interests contrary to the provisions of Article I, §9, of the Florida Constitution by denying them procedural due process in the determination of certain matters; (4) that, by requiring certain disclosures, inmates are compelled to be witnesses against themselves; and (5) that it violates the Florida Constitution by granting overly broad legislative powers to an administrative agency. Appellees' App., at A21-A23.

The Florida Supreme Court held that the issue of disclosural privacy was foreclosed by its recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Assoc., 379 So.2d 633 (Fla. 1980).

Ivory v. Wainwright, 393 So.2d 542, 544 (Fla. 1980) reh. den., ___ So.2d ___ (Feb. 20, 1981). Appellants' App., at 15-19. The court found no merit to plaintiffs' challenge to the statute based on the prohibition against ex post facto laws, citing Flemming v. Nestor, 363 U.S. 603 (1960) and Zarsky v. State, 300 So.2d 261 (Fla. 1974). 393 So.2d at 544. Similarly, the court, citing Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) and Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla.) cert. denied, 417 U.S. 935 (1974), dismissed the plaintiffs' procedural due process arguments. 393 So.2d at 544. The plaintiffs' two final arguments, that the statute infringes upon their privilege against self-incrimination and is an

unlawful delegation of legislative power, arguments not raised in this Court, were found wanting in merit. Id. In ruling upon the plaintiffs' challenges to §944.485, the majority did not specifically refer to either the Florida or the U.S. Constitution.

Upon denial of their motion for a rehearing, ___ So.2d ___ (Feb. 20, 1981), the plaintiffs brought this appeal. In their jurisdictional statement, the plaintiffs challenge §944.485 on the following grounds: (1) that it violates the right to privacy, (2) that it violates the ex post facto provisions of the U.S. Constitution; (3) that it deprives the plaintiffs of procedural due process, and (4) that it deprives the plaintiffs of substantive due process. The

plaintiffs profess to have raised these federal constitutional issues in the Florida Supreme Court.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

As can be plainly seen from reading the summary of the proceedings below, supra, the plaintiffs raised only one federal constitutional issue in the Florida Supreme Court which they raise here -- that §944.485 violates their right of privacy. All other challenges to the statute raised in this Court were either based exclusively on the Florida Constitution in the court below or, in the case of the plaintiffs' substantive due process argument, not raised at all. Furthermore, the plaintiffs' in forma pauperis petition is not in accordance

with the rules of this Court. Because this Court is without jurisdiction to hear issues not raised in the court below, because the plaintiffs' appeal is not taken in accordance with this Court's rules, and because the only federal constitutional issue raised below presents an insubstantial federal question, this appeal must be dismissed.

B. THE PLAINTIFFS' FAILURE TO PRESENT THE QUESTIONS RAISED HERE TO THE FLORIDA SUPREME COURT BARS CONSIDERATION OF THOSE ISSUES BY THIS COURT.

This Court's jurisdiction is invoked by the plaintiffs pursuant to 28 U.S.C. §1257(2), which provides for review

> [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The predecessor of this statute was very early interpreted to give this Court jurisdiction only where the federal question was both raised and decided in the state court below. Crowell v. Randell, 10 Pet. 368, 398 (1836). Thus, this Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).[2] The jurisdictional statute is satisfied only if the record shows that the question of the validity under

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[2]Cardinale was before this Court on a petition for a writ of certiorari, as were a number of other cases cited by the defendants in their argument. Because the statute giving this Court jurisdiction to review by certiorari a state decision also requires that the state statute be "drawn in question on the ground of its being repugnant to the Constitution . . . of the United States", 28 U.S.C. §1257(3), the standard for

federal law of the state statute has either been presented for decision to the highest court of the state or has in fact been decided by it. Wilson v. Cook, 327 U.S. 474, 480 (1946).

It is not enough to show that a provision of the federal constitution is applicable. Crowell v. Randall, 10 Pet. at 394. Where the highest court of a state has not specifically passed upon a federal question, it will be assumed by this Court that the omission was due to want of proper presentation in the state court. Fuller v. Oregon, 417 U.S. 40, 50 n.11 (1974); Street v. New York, 394 U.S. 576, 582 (1969). To overcome this pre-

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determining whether juridiction exists is the same. Cf., e.g., Bailey v. Anderson, 326 U.S. 203 (1945) (appeal) with Fuller v. Oregon, 417 U.S. 40 (1974) (on petition for a writ of certiorari).

sumption, the burden is on the appellant to affirmatively show that the federal constitutional question was raised and decided in the highest state court. Fuller v. Oregon, 417 U.S. at 50 n.11. If it does not appear that the federal question was raised at the proper juncture in the state court proceedings or in accordance with reasonable state rules, and that the question was not decided by the highest state court, the appeal must be dismissed for want of a properly presented federal question. Godchaux Co. v. Estopinal, 251 U.S. 179 (1919).

In determining whether the party seeking redress in this Court presented the federal issues to the highest state court, the Court will look to the record to determine what arguments were made

before the court below, and to state procedural rules mandating the form in which questions must be raised and presented to the state courts to determine if those rules were followed. Webb v. Webb, 49 U.S.L.W. 4500, 4501 & n.4 (May 18, 1981); Beck v. Washington, 369 U.S. 541, 549-54 (1962); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945).[3] A review of the plaintiffs' brief on appeal to the Florida Supreme Court and of Florida procedural rules plainly reveals that the questions raised here by the plaintiffs, save one, were not raised in the highest

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[3]A review of the state procedural rules can be construed either as an aid in deciding, as a federal matter, whether the federal constitutional question was raised below, or as an independent and adequate state ground for decision barring federal review. Webb v. Webb, 49 U.S.L.W. 4500, 4501 n.4 (May 18, 1981).

state court. Appellees' App., at A21-A60.

The plaintiffs' most obvious attempt to add a federal issue not raised below is their assertion in this Court that §944.485 violates their substantive due process rights. This issue was not even raised as a state constitutional question in the Florida Supreme Court and is nowhere argued in their brief in that court. See, Appellees' App., at A21-A60. Two of the issues the plaintiffs attempt to raise here, that the Florida statute deprives the plaintiffs of procedural due process and violates the ex post facto provisions of the United States Constitution, were raised only as challenges under the Constitution of the State of

Florida[4] in the Florida Supreme Court. See, Appellees' App., at A22-A23.

In the body of their brief, in addressing their contention that the statute in question is an ex post facto law, to which they devote one and one-half pages of argument, the only mention of the federal constitution is found in a single citation: "See, . . . Article I, §9, United States Constitution." Appellees' App., at A32. Similarly, while citing only the procedural due process guarantee of the Florida Constitution in their statement of issues, Appellees'

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[4]The plaintiffs specifically refer only to Art. I, §§9 & 10 of the Florida Constitution. Art. I, §9, provides that "[n]o person shall be deprived of life, liberty or property without due process of law, . . ." Art. I, §10, states that "[n]o . . . ex post facto law. . . shall be passed."

App., at A22-A23, the plaintiffs cite to the Fourteenth Amendment to the United States Constitution in the body of the brief, as well as to four federal cases discussing procedural due process. Appellees' App., at A36-A41.

If it were not obvious from a mere reading of the plaintiffs' brief that this presentation was insufficient to put the federal consitutional issues raised here before the Florida Supreme Court, the Florida courts' interpretations of the state constitution and state procedural rules plainly show that these issues were not properly before the state's highest court.

In interpreting the state's constitution, the state courts of Florida sometimes look to analogous federal constitu-

tional provisions and federal court cases interpreting those provisions, which the Florida courts regard as persuasive. Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc., 379 So.2d 633, 639 (Fla. 1980); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820, 825 (1937); Houston v. State, 113 So.2d 582, 584-85 (Fla. 1st Dist.Ct.App. 1959). The same is true of federal statutes and procedural rules which are similar to state statutes and rules. Savage v. Rowell Distributing Corp., 95 So.2d 415, 417 (Fla. 1957); Bedenbaugh v. Lawrence, 141 Fla. 351, 193 So. 74, 76 (1940); Tilton v. Horton, 103 Fla. 497, 137 So. 801, 805 (1931); Booker v. Smith, 108 So.2d 790, 795 (Fla. 2nd Dist.Ct.App. 1959). Thus, in the face of the plaintiffs' omission of any federal constitu-

tional due process or ex post facto arguments from their statement of questions presented in their brief before the Florida Supreme Court, the citations to federal cases and the federal constitution should be interpreted merely as citation of persuasive authority for construction of similar state constitutional guarantees.

The Florida Supreme Court has ruled that it will decide only those issues properly presented to it. Laramore v. Laramore, 64 So.2d 662, 670 (Fla. 1953). While technical "assignments of error" are no longer required, Rule 9.040(e), Fla.R.App.P, under Rule 9.210(b)(1), Fla. R.App.P., alleged errors committed in the lower court shall be classified as "issues presented for review" in the

brief on the merits. See, Ratner v. Miami Beach First National Bank, 362 So.2d 273, 274 (Fla. 1978). Indeed, the Committee Notes to Rule 9.210, 32 Fla. Stat.Ann., following Rule 9.210, Fla. R.App.P. (Supp. 1968-80), admonish that

> [t]he abolition of assignments of error requires that counsel be vigilant in specifying for the court the errors committed, that greater attention be given the formulation of questions presented; and that counsel comply with subsection (b)(5) [of Rule 9.210] by setting forth the precise relief sought. The table of contents will contain the statement of issues presented.

An appellant before the Florida Supreme Court must clearly set out the errors complained of, and issues only "slightly argued" will be treated as abandoned. McKinnon v. Lewis, 60 Fla. 125, 53 So. 940, 941-42 (1910); see also, State v. Jensen Road and Bridge District,

144 Fla. 442, 198 So. 105, 106-07 (1940). Finally, the Florida Supreme Court has long held that even where a particular point is raised in the court below, it must be specifically raised in the state supreme court to be considered by that court on appeal. Citizens National Bank of Naples v. Indiana Ins. Co., 340 So.2d 107 (Fla. 1976); State v. Williams, 198 So.2d 21, 23 (Fla. 1967); City of Miami v. Steckoff, 111 So.2d 446 (Fla. 1959); Jones v. Neibergall, 47 So.2d 605, 606 (Fla. 1950); Florida Power Corp. v. Pinellas Utility Board, 40 So.2d 350, 358 (Fla. 1949) (en banc); Jacques v. Wellington Corp., 134 Fla. 211, 183 So. 718 (1938).

Applying these rules to the case sub judice, it is clear that the plaintiffs

did not properly raise federal substantive and procedural due process and ex post facto claims before the Florida Supreme Court. This omission is most obvious in the "Issues of Law" presented for review in the plaintiffs' brief before the Florida Supreme Court. Appellees' App., at A22-A24. Moreover, the mere fact that the plaintiffs' complaint may have presented some of these issues to the trial court does not show that they were properly before the Florida Supreme Court. See, Appellees' App., at A1-A20. Finally, even if the plaintiffs' ex post facto argument was before the state supreme court as a federal constitutional issue, it was abandoned by the "slight argument" presented on the point to that court.

C. THE FLORIDA SUPREME COURT DID NOT DECIDE THE FEDERAL CONSTITUTIONAL QUESTIONS RAISED HERE.

It is clear from the opinion below that the Florida Supreme Court did not decide, except for the right of privacy issue, the federal constitutional questions the plaintiffs attempt to raise in this Court. No substantive due process argument was even mentioned in the opinion. Ivory v. Wainwright, 393 So.2d 542 (Fla. 1980). In dismissing the plaintiffs' ex post facto claim, the state supreme court cited two cases, one a decision of this Court discussing the federal constitutional guarantee against ex post facto laws, and the other a state supreme court decision, Zarsky v. State, 300 So.2d 261 (Fla. 1974) 393 So.2d at 544. Zarsky simply cites to two other

decisions, Cross v. State, 96 Fla. 768, 119 So. 380 (1928) and Washington v. Mayo, 91 So.2d 621 (Fla. 1956). The latter case merely cites the former as authority. The Florida Supreme Court, in Cross, considered whether the statute under attack in that case was an ex post facto law under the state and federal constitutions. However, the constitutionality of the statute under the Florida Constitution is clearly considered as a separate issue by the court. Cross v. State, 119 So. at 385.

Similarly, in deciding whether the Florida statute violates the plaintiffs' procedural due process rights, the court cited one federal decision and one state decision, Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla.

1974). In Moore, the court, without citing to any specific authority, held that there was no absolute right to parole. 289 So.2d at 720. It is apparently from this statement that the court below found authority for its conclusion that there is no liberty or property interest in parole. 393 So.2d at 594.

That the state supreme court cited decisions of this Court interpreting federal constitutional guarantees does not show that the court below actually decided any federal questions. This Court, in attempting to decide whether it had jurisdiction over a particular case arising from a state court, has refused to regard as dispositive the fact that a state court cited federal constitutional cases, finding it possible that the state

court regarded the federal decisions as merely persuasive authority for interpretation of its own state constitution. Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940); Levy v. Superior Court, 167 U.S. 175, 177-78 (1897). That is the most obvious reason for the federal citations here. As pointed out by the defendants, supra, Florida courts regard as persuasive authority federal court interpretations of federal constitutional provisions, federal statutes, and federal rules of procedure, when they are similar to those of Florida. Therefore, the state supreme court's citation of federal constitutional decisions can no more be regarded as a decision of a federal constitutional issue itself than can a state decision citing a federal case construing a federal procedural rule be regarded as

a decision on an issue of federal procedure.

Even assuming, arguendo, that the decision below is unclear as to its basis, decisions of this Court make clear that the Court is without jurisdiction to decide this case. As the Court has explained:

> It may be surmised, from the quotations in its opinion, that the [New York] Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment [to the U.S. Constitution], and that the affirmance by the [New York] Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise.

Lynch v. New York ex rel. Pierson, 293

U.S. 52, 54 (1934) (emphasis supplied).[5] If the grounds for decision are unclear, it is up to the appellant to affirmatively show that jurisdiction exists. Durley v. Mayo, 351 U.S. 277, 281 (1956). In their jurisdictional statement, the plaintiffs simply assert

> On October 30, 1980, the Supreme Court of Florida affirmed the trial court's judgment, expressly holding the statute non-violative of rights to privacy, not in violation of the prohibition against ex post facto laws, and that the

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[5]Of course, the defendants do not contend that the state constitution would be an adequate state ground for a decision upholding the state statute if the federal constitutional challenges had been properly presented. Cf., Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) (state constitutional grounds were adequate and independent state grounds for decision striking down state statute as unconstitutional.) The defendants simply point to Lynch and cases like it to show that this Court will not assume jurisdiction exists; it must be clearly presented. This the plaintiffs have failed to do.

> statute did not deny Appellants liberty or property without procedural due process. With one justice dissenting, the majority of the Florida Supreme Court upheld the statute as against the constitutional challenge.

Appellants' Jurisdictional Statement, at 3. This falls far short of the mark established in Lynch and Durley. See, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 488-492 (1965).

Finally, even if the plaintiffs can be regarded as having attempted to raise the federal constitutional issues in the state supreme court, the court could have refused, sub silentio, to decide those issues for want of proper presentation. As discussed supra, any attempt in the court below at raising the federal questions the plaintiffs have tried to

present to this Court was not in accordance with the Florida Rules of Appellate Procedure and decisions of the Florida Supreme Court, thus precluding review of these issues by the Florida Supreme Court. In Stembridge v. Georgia, 343 U.S. 541 (1952), the Georgia Supreme Court had denied, without opinion, a petition for a writ of certiorari to review a decision of the state court of appeals. The petition to the state supreme court contained a recital that the jurisdiction of that court to decide the case was based upon a violation of the petitioner's due process and equal protection rights as guaranteed by the Georgia and U.S. Constitutions. This Court, in dismissing the writ of certiorari, found it apparent that the Georgia Supreme Court took no action on

the federal constitutinal questions because those questions were not properly raised in accordance with its rule that such objections be raised in the trial court, and that the petitioner's attempt to raise these questions in general terms did not meet the state supreme court's requirements for definiteness of presentation. 343 U.S. at 547. As is true in the case sub judice, because the Georgia Supreme Court could have denied certiorari on adequate state grounds, this Court had no jurisdiction to review the state decision. Id.; see, Webb. v. Webb, 49 U.S.L.W. at 4501 n.4.

Finally, in addition to the technical requirements of 28 U.S.C. §1257, there are good policy reasons for this Court's refraining from deciding

questions not raised and decided below.

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them.

Cardinale v. Louisiana, 394 U.S. at 439 (cit. omitted).

D. THE ONLY FEDERAL CONSTITUTIONAL QUESTION RAISED AND DECIDED BELOW IS INSUBSTANTIAL.

There is only one federal constitutional issue presented by this appeal which was raised and decided below -- the

plaintiffs' claim that Fla. Stat. §944.485 violates their right of privacy. Because that issue presents an insubstantial federal question, this appeal must be dismissed. Rule 16.1(b), Rules of the U.S. Supreme Court. Alternatively, the defendants request that the decision of the Florida Supreme Court be affirmed on the ground that the sole federal question is so unsubstantial as not to require further argument. Rule 16.1(d), Rules of the U.S. Supreme Court; see, C. Wright & A. Miller, 16 Federal Practice and Procedure §4014, at 175 n.23 (Supp. 1980).

The plaintiffs challenge §944.485 on the ground that it requires them to disclose certain financial information to the Florida Department of Corrections.

This, they claim, is in violation of their right to privacy as guaranteed by the U.S. Constitution.

This Court has recognized two, and perhaps three, zones of privacy protected by the federal constitution. The first is rooted in the fourth amendment prohibition against unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1 (1968); Weeks v. United States, 232 U.S. 383 (1914). While the plaintiffs say in their jurisdictional statement that "using parole eligibility as a coercive factor, Florida's scheme borders on being an unreasonable search within the meaning of the Fourth Amendment", Appellants' Jurisdictional Statement, at 10, the contention that the requirement that certain financial information be disclosed

constitutes an unreasonable "search" can only be described as frivolous.

Second, this Court has recognized the right of the individual to be free from government interference in making certain types of important, and very personal, decisions. This right to privacy has been strictly limited to decisions relating to intimate personal activities and relationships, such as procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); marriage, Loving v. Virginia, 388 U.S. 1 (1967); and child rearing, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). As in Paul v. Davis,

424 U.S. 693, 713 (1976), the plaintiffs' claim that the required financial disclosure violates their privacy rights "is far afield from this line of decisions." For example, despite this Court's holding that a woman's decision as to whether to have an abortion fell within the zone of privacy protected by the federal constitution, Roe v. Wade, 410 U.S. 113 (1973), the Court has upheld record-keeping requirements for abortions over the objection that it would constitute government interference with the woman's choice. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 78-81 (1976). See also, Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979).

The third privacy interest has been described as the individual's interest in avoiding public disclosure of personal matters. Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977). However, in neither Whalen or Nixon did this Court explicitly hold that a federal constitutional right of privacy absolutely precludes government dissemination of private matters. In each case, the Court found that the information would not be disclosed to the public generally. Accordingly, no privacy interests were violated.

The plaintiffs' disclosure of limited financial information does not fall within the same category of deeply personal information under consideration

in Whalen (prescriptions for controlled substances), and in Nixon ("extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files." 433 U.S. at 459.). Even assuming, arguendo, that the Court would choose to apply this third and newest privacy right to the case sub judice, here, too, access to the information which must be disclosed is limited to certain categories of persons. Both Fla. Stat. §945.10 (1979) and Rule 33-6.06, Fla. Admin. Code, prevent unrestricted access to the financial information. Appellees' App., at A70-A76. Accordingly, the plaintiffs' claims must meet

the same fate as that of the complainants in Nixon and Whalen.

Because the plaintiffs have presented an issue clearly foreclosed by previous decisions of this Court, the appeal must be dismissed for want of a substantial federal question, Rule 16.1(b), Rules of the U.S. Supreme Court, or, alternatively, summarily affirmed, Rule 16.1(d), Rules of the U.S. Supreme Court.

E. THIS APPEAL IS NOT TAKEN IN ACCORDANCE WITH THE RULES OF THE U.S. SUPREME COURT IN THAT THE APPELLANTS' IN FORMA PAUPERIS CERTIFICATE DOES NOT COMPLY WITH RULE 46, RULES OF THE U.S. SUPREME COURT.

An appeal may be dismissed if not taken in accordance with the Rules of this Court. Rule 16.1(a), Rules of the U.S. Supreme Court. The plaintiffs are

attempting to proceed in forma pauperis, yet they have failed to comply with Rule 46.1, Rules of the U.S. Supreme Court, in that their paupers' affidavit is not in the form prescribed by Form 4 of the Federal Rules of Appellate Procedure. Accordingly, their appeal should be dismissed.

V. CONCLUSION

The questions raised on appeal here, save one, were not raised or decided in the Florida Supreme Court. The one federal constitutional issue raised and decided below is insubstantial. Finally, the appeal is not taken in accordance with the rules of this Court, in that the appellants have failed to comply with Rule 46.1, Rules of the U.S. Supreme Court.

Accordingly, the appellees respectfully request that this Court dismiss the appeal, or, alternatively, that the decision of the Florida Supreme Court be summarily affirmed.

Respectfully submitted,

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ATTORNEYS FOR APPELLEES

APPENDIX

IN THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, JAMES RUTLEDGE,

Plaintiffs,

vs. CASE NO. _____

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, FLA., PAUL MERCHECK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Defendants.
_____/

COMPLAINT: CHALLENGING CONSTITUTIONAL VALIDITY OF CHAPTER 944.0265, FLORIDA STATUTES, 1979

This is a civil action authorized by Chapter 86 of the Florida Statutes, 1977. Plaintiffs seek Declaratory and Injunctive Relief of Rights secured under the State and Federal Constitution. The Court has jurisdiction under the article V, Sec. 5 (b) Fla. Const. and 86.011 Fla.

Stat. (1977) et. seq. For the first cause of action Plaintiffs would show:

1. All Plaintiffs herein this action is and was, at all times mentioned in this complaint, prisoners of the State of Florida in the custody of the Department of Corrections. They are presently confined at the Union Correctional Institution in Raiford, Florida.

2. Defendant Louie L. Wainwright is the Secretary of the Department of Corrections. His office is located in Tallahassee, Florida. He is responsible for the overall operations of each Correctional Institution in the State of Florida including Union Correctional Institution.

3. Defendant Paul Mercheck is the Director of the Parole and Probation Commission. His office is located in

Tallahassee, Florida. He is responsible for the overall operations of the Florida Parole and Probation Commission including the prison inmates determination for elegibility for parole.

4. Plaintiffs, as prison inmates, are within the scope and application of chapter 78-441, General Laws of Florida, also known as Provision 944.0265, Florida Statutes (1979) and Provision 944.485, Florida Statute Supplement (1978). This law will herein be referred to sometimes as the inmate subsistence cost law.

5. The inmate subsistence cost law provides in part as follows:

Section 1. Section 944.0265, Florida Statutes, is created to read: 944.0265, Department to adopt plan for subsistence fees with regard to certain prisoners: time of adoption;

requirement.--

(1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside of the correctional system which may include bank accounts, inheritances, real estate, social security payments, veterans' payments and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state, all prisoners except those who have entered into an agreement under s. 947.135, Florida Statutes, prior to the effective date of this act; in the state correctional system:

(a) shall disclose all revenue or assets, as a condition for parole

eligibility.

(b) shall pay from such income and assets, except where such income is exempt by state or federal law, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian of the estate of the victim, and the need of his dependents, all or a fair portion of the prisoners' daily subsistence costs.

6. The inmate subsistence costs law imposes upon the defendants the duty, within their respective jurisdictions, to enforce same.

7. The effect of said law upon Plaintiffs is to compel them to make a financial disclosure statement listing total income and assets and for refusal Plaintiffs would automatically be deprived of their statutory right to parole

eligibility, as penalty. The inmate subsistence costs law also mandates that inmates in the Florida Prison System pay the costs for their room, board, and other upkeeps. The law, however, expressly, and otherwise, makes exclusions for some inmates from its enforcement. The defendants has taken the necessary actions as to put said law into effect upon Plaintiffs. The burden of the inmate financial disclosure law upon plaintiffs are unreasonable, arbitrary and unnecessary. Said statement could be used either as evidence or an investigatory lead against Plaintiffs in a legal prosecution, and as a penalty or forfeiture.

8. The inmate subsistence costs law bears no reasonable relationship to the health, safety and welfare, nor does it

promote general prosperity, for plaintiffs nor the general public. Such law, therefore, cannot be justified as a legitimate exercise of the police power of the State of Florida, said law claims within that it purports to benefit the taxpayers, but tends against same.

9. Plaintiffs were not properly informed about the hearings and the drafting of said law. They knew nothing, or very little, about the proceedings, which-by this law was passed. To the best of plaintiffs knowledge, no governmental authoritative source, or otherwise, came to the prisons to address the persons this law would affect on the subject. Plaintiffs communication with the general public is limited. The responsibilities of notifying Plaintiffs, as part of the public, in regards to the

preparations and presentations of preliminary hearing was not properly fulfilled. Certain due process requirements are constitutionally mandated before bills can be justifiably passed into law. Such process is lacking in the law complained of here. Even though plaintiffs are imprisoned the law affects them and they had a right to be properly notified and heard before such law was enacted on by the legislature ultimately.

10. Plaintiffs, as State Prisoners, are compelled by law to provide free labor as part of paying a debt to the state. The State legislature recently enacted laws whereas the Department of Corrections could sell their inmate free labored marketing products to the public, themselves, and other governmental agencies. This includes, but not limited

to, livestock, farm and dairy products, automobile tags, furniture, fish, poultry, etc. The revenue income from such marketing is great and ever greater because of inmate free labor. This would indicate alone that the Department of Corrections could absorb its costs for maintenance and that passing of a law compelling prison inmates to pay the costs of their upkeep while imprisoned and performing free labor towards costs is unreasonable, arbitrary and unnecessary with no benefit to the public generally.

11. It is common knowledge that the taxes collected revenues by the State of Florida has exceeded its budget costs for operations by millions and millions of dollars recently. Prison maintenance nor any other governmental body palpably

is of no unbearable financial burden to the Florida general public. Moreover, the Florida System is subsidized by Federal financial aids. There is no apparent reasonable cause to justify the legislative enactment of the law complained of here. Plaintiffs feel that this legislative action is an act of oppression against them without any benefit to the public generally and that such action has affectd their rehabilitative process. Legislative action is needed that would allow plaintiffs to be more self sufficient upon their release, not less, indeed, this would be more beneficial to the public generally. The Plaintiffs and the public would benefit from such legislation by not having to bear the burden and costs of recidivism, to say the least.

12. The demands imposed upon Plaintiffs under 944.0265, Fla.Stat. (1979), which forces Plaintiffs to bear the burden of paying the costs for their personal daily upkeep while imprisoned constitutes, in the absence of reasonable justification therefor, a confiscation of plaintiffs' property. Plaintiffs assets and finances are their own property and illegal demands which depletes said properties against plaintiffs desires is confiscation of whatever portions that may be, and cannot be justified under the State's Police Power.

13. For the reason herein before alleged the inmate subsistence costs law, section (1),(a) & (b) is unreasonable, arbitrary and capricious and deprive the plaintiffs of their property without due process of law in violation to article 1,

section 9 of the Constitution of Florida, and the 14th Amendment to the United States Constitution.

14. Unless the Court enters a judgment declaring 944.0265 Fla. Statute to be void and invalid and restrains and enjoins the defendants, as Plaintiffs herein prays, plaintiffs are either compelled or subjected to pay the costs for their personal upkeep, and make financial disclosure statements, self-incriminating, without immunity, or forfeit parole while imprisoned, extending their stay in the state prison system as penalty and plaintiff have sustained or will sustain irreparable injury thereby for which they cannot be compensated by money damages. See Plaintiffs Exhibit "A", Copy of disclosure statement form.

15. Plaintiffs have no adequate remedy at law.

AS AND FOR THE SECOND CAUSE OF ACTION

16. Plaintiffs repeat and allege the allegations and each of them, contained in paragraphs "1" through "11", and paragraphs "14" and "15", with the same force and effects as if herein set forth at length.

17. The Florida Legislature, in the enactment of chapter 78-441 section (1), (b), General Law of Florida, single out a group of Florida prisoners, of which Plaintiffs are a part, and imposed by statute upon them alone, arbitrary, unreasonable and unnecessary demands that they bear the burden of paying the costs for their personal daily keep while they are imprisoned. To Plaintiffs' knowledge, there is no other state in this

country that demands same especially where prison inmates provide free labor by law. Such discrimination is also invidious.

18. Section (1)(b) of Chapter 78-441, General Laws of Florida expressly exempts certain inmates from the burden and costs complained of herein. It appears that other inmates in the state prison system, in the group with plaintiffs, which are considered like affluent, or may become same, shall or is subject to pay the costs required by said law. The equal protection clause provides for the rich as well as the poor. The disparate treatment shown herein against plaintiffs is illegally motivated also. The inmates excluded from this law by this law are either poor and shall remain same or are excluded by same.

19. The action of the legislature, as aforesaid, in subjecting plaintiffs to the unreasonable and burdensome demands of the inmate subsistence costs law 944.0265, (1), (b), to the advantage of other inmates similarly situated, together with the classification made by it in section (1)(b), by excluding inmates that come within 947.135 Fla. Stat., and others, is discriminatory and is arbitrary and capricious and denies to plaintiffs equal protection of the laws of the state of Florida and the United States contrary to article 1 section 2 of the Constitution of the State of Florida and Fourteenth Amendment of the Constitution of the United States.

AS AND FOR A THIRD CAUSE OF ACTION

20. Plaintiffs repeat and reallege the allegations and each of them con-

tained in paragraphs "1" through "11", and paragraphs "14" through "15", with the same force and effect as if herein fully set forth at length.

21. The inmates subsistence costs laws, section (1)(a), impose upon plaintiffs, as imprisoned inmates, a compulsory demand that they either make a financial disclosure statement or forfeit their right to parole eligibility. Said law adversely affects plaintiffs right against self-incrimination, and abridges plaintiffs statutory privilege, without granting immunity, to parole eligibility, extending imprisonment as penalty without legitimate reason. The information demanded by this law is not one of normal public information and bears no reasonable benefit to the public generally through said disclosure. Without the

constitutional immunities due plaintiffs they fear that, potentially disclosure could cause them penalty, forfeiture, or prosecution on the basis of such personal disclosure as required by the law complained of herein. Such enforcement of said law cannot be justified as a legitimate exercise of police power by the State of Florida.

22. The inmate subsistence costs laws impose undue and unreasonable demands upon plaintiffs by requiring that they make a financial disclosure statement without providing immunity, which could be self-incriminating or, alternatively, forfeit their statutory privilege to parole eligibility as penalty violative of the clauses against self-incrimination afforded plaintiffs and protected by the fifth Amendment of the

United States Constitution and article 1, Section 9 of the Florida Constitution. The said law also violates the clause that protects against abridging privileges and immunities guaranteed plaintiffs by section 1 of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs demand a judgment of this Court:

A. Declaring that Provision 944.0265, sections (1)(a) and (1)(b), and each of them, are null and void unconstitutional and of no force and effect.

B. Permanently or Preliminarily at this juncture, enjoining defendants, their successors, and all persons acting under their direction, from enforcing or attempting to enforce the inmate subsistence cost laws of the State of

Florida, and each of them, or from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character to recover from or impose upon or enforce against plaintiffs any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said chapters and each of them, or from interfering with or attempting to interfere with or from advising, instituting, prosecuting or aiding in any action, suit or proceeding to interfere with, restraining or preventing plaintiffs from not paying subsistence costs and making financial disclosure statements as was before this law complained of herein was enacted.

C. Granting Plaintiffs a jury trial on all matters triable thereby.

D. Granting Plaintiffs such other and further relief as to the Court may deem just and proper, together with the costs of this action.

NOTE: The defendants and the State Attorney of Leon County shall be served with copies of the foregoing complaint as required by law.

Respectfully submitted,

s/ Eddie Samuel Ivory
EDDIE SAMUEL IVORY, et al.

s/ Eddie Samuel Ivory

s/ Robert J. Butler

s/ Charles Johnson

s/ Edmond Duhart

s/ Blair Smith

s/ George Heller

s/ Ben Chaney

s/ James Rutledge

[Verification and Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.
_____/

BRIEF OF APPELLANTS

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[Appellants' "Table of Citations", and "Statement of the Case", and "Statement of Facts" are omitted from Appellees' Appendix. Also omitted are Appellants' "Issues of Law", which merely repeats the issues presented as they are set out in the Appellants' Table of Contents, and Appellants' "Exhibit A" to their brief.]

I.

A. SECTION 944.485, F.S., IN REQUIRING INMATES TO DISCLOSE THEIR ASSETS OR INCOME OR LOSE THEIR PAROLE ELIGIBILITY, IS AN INVASION OF THEIR RIGHT TO PRIVACY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 944.485, F.S., requires inmates to "disclose all revenue or assets as a condition of parole eligibility." It is the position of the Appellants that this scheme, which requires inmates to disclose their assets and income or lose their parole eligibility, is an invasion of their right to privacy. The issue of privacy is not entirely one of federal jurisprudence. The Florida Constitution, through the Declaration of Rights, contains a guarantee of the right of disclosural privacy. Section 12 of the Declaration of Rights insures people "against

the unreasonable interception of private communications by any means . . . ." This protection is not rooted in property concepts. It is based on the integrity of personhood. Markham v. Markham, 265 So.2d 59 (Fla. 1st DCA 1972), affirmed, 272 So.2d 813 (Fla. 1973).

In Byron, Harless, Schaffer, Reid & Associates, Inc. v. State, 360 So.2d 83 (Fla. 1st DCA 1978), the First District Court of Appeal stated:

> [T]he Florida Constitution expresses the theme that disclosure privacy--the personal right of some control over the broadcast of intimate information concerning the self--is an aspect of personhood which is to be protected, as are others, as fundamental.

That Court, in denying to the press certain reports on candidates for public positions, stated that to override pri-

vacy interests of constitutional dimensions, a state interest which is compelling must be present.

> When fundamental privacy interests, secured by the Due Process Clauses of the United States and Florida Constitutions, are implicated, however, it is not enough that a statute generally serves a compelling interest in the disclosure of public records. There must be a compelling state interest in the public revelation of the particular information in which the prospects [here the inmates] would otherwise enjoy privacy. To override constitutional privacy interests, a countervailing state interest must exist and be compelling at the point where those interests collide. When the public interest is not sufficiently compelling to override constitutional privacy interests in the particular information sought, an intrusive statute "must be narrowly drawn to express only the legitimate state interest at stake," or its general terms must be appropriately narrowed in judicial application.

Id. at 97. The particular statute involved here and the information demanded is a complete disclosure of financial assets and revenue as a condition of parole eligibility. Traditionally, one's revenue and financial status has been treated as a private matter, not a matter of public record. Unemployment compensation claims are filed by social security number to protect the identity of claimants. Financial information is considered confidential. Section 443.12, F.S. Similarly, income tax returns filed with the Internal Revenue Service are held to be confidential. 26 U.S.C., §7213.

Disclosure of financial information by inmates is not protected from exposure to the public through the Public Records Act. Ch. 119, F.S. It is revealed to the whole world, including fellow inmates

who may use knowledge of an inmate's financial condition to target potential victims of extortionate schemes.

Even assuming that the state has some compelling interest to force one to pay for one's incarceration, which the Appellants do not concede, disclosure of financial information at the peril of one's loss of parole eligibility is not required for that interest to be served.

A compelling state interest will override privacy interests of constitutional dimensions if the public interest cannot be met by other means less drastic or intrusive. See, Byron, Harless, supra, at 96. The task for the Court is to identify and balance the privacy interest, the public interest, and the alternatives.

Assuming for the sake of argument that the state has an interest in the inmate paying for his incarceration. Assuming for the sake of argument that the assessment fee, as determined by the agency, is appropriate. The assessment could be made on the inmate. He could pay it or refuse to pay it. What need is there of financial disclosure? If the Department is not paid, it can reduce the debt of an inmate to a judgment and seek execution on that judgment. After reducing the debt to a judgment, it can depose the inmate, Rule 1.560, Florida Rules of Civil Procedure, and determine the assets available for execution. What need is there at all for financial disclosure?

The situation of the inmate is quite different from those who have attained or are seeking public office. Financial disclosure, in the context of the public official, may only be met by a revelation of the sources of his substantial income. The compelling state interest involved with a public official is to reveal his potential conflict of interests. Such is not the situation with the inmate. It should be clear that the disclosure requirement of §944.485, F.S., is constitutionally infirm. This Court is requested to so hold.

II.

B. SECTION 944.485, F.S., INSOFAR AS IT IMPOSES AN ADDITIONAL PUNISHMENT OR CIRCUMSTANCE OF PUNISHMENT ON INMATES WHOSE OFFENSES PREDATED THE EFFECTIVE DATE OF THE ACT, IS AN EX POST FACTO LAW CONTRARY TO ARTICLE I, §10, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

It is the contention of Appellants that §944.485, F.S., violates the constitutional prohibition against ex post facto laws. See, Article I, §10, Constitution of the State of Florida, and Article I, §9, United States Constitution. Those inmates whose crimes predate the effective date of that section are now facing new punishments. Whatever revenue or assets they may have had before incarceration will now be stripped from them. This may include their homestead, and the thousand dollars ($1,000.00) personal property exemption

enjoyed by debtors against execution. Such may be postured as a fee, but it is, in reality, a collateral consequence of incarceration. It is a punishment.

It is well-settled that any increase in punishment, or even lessening of parole eligibility by a statute applying to a crime already committed is a violation of the prohibition against ex post facto laws. In the inmates situation, a whole new penalty has been enacted and applied retroactively, the paying of substantial subsistence costs which were not in effect at the time of the crimes. In the opinion of the Appellants, this is a fine. Even if it could be construed to be something other than a fine, it is clearly a new circumstance of punishment. See Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937);

Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68 (1925); Lee v. State, 294 So.2d 305 (Fla. 1974).

This is not a Holiday Inn where one voluntarily seeks lodging. It is not a health institution where one voluntarily seeks treatment. All those in prison are there involuntarily. The next time the judge says, "Thirty dollars or thirty days", and the convicted defendant elects to spend thirty (30) days in an institutional setting, working at hard labor, he may find the County Commission passing an ordinance imposing, after his conviction, a subsistence charge that greatly exceeds the thirty dollars ($30.00). If a rose is a rose, as Gertrude Stein once said, then this subsistence cost is a punishment. This Court is respectfully requested to declare §944.485, F.S.,

unconstitutional as an ex post facto law, insofar as it applies to those inmates whose crimes predate the effective date of the law, October 1, 1978.

III.

C. SECTION 944.485, F.S., DEPRIVES INMATES OF PROPERTY AND LIBERTY INTERSTS CONTRARY TO THE PROVISIONS OF ARTICLE I, §9, OF THE FLORIDA CONSTITUTION BY DENYING THEM PROCEDURAL DUE PROCESS IN THE DETERMINATION OF THE PER DIEM SUBSISTENCE COST, THEIR INDIVIDUAL ASSESSMENT, AND THEIR DENIAL OF PAROLE ELIGIBILITY.

It is the Appellants' position that the deprivation of property envisioned by this statute in regulation without any hearing and with the practical affect of taking away parole eligibility is a deprivation of property and liberty interests without due process of law. It, thus, violates the Fourteenth Amendment of the Constitution of the United States and Article I, §9, of the Constitution of the State of Florida. Before the government deprives a person of property, that person should have an opportunity to be

heard. Sniadich v. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820 (1968); Goldberg v. Kelly, 397 U.S. 254; Morrissey v. Brewer, 408 U.S. 471; and Fuentes v. Shevin, 407 U.S. 67.

In the context of §944.485, F.S., there is no opportunity for the inmate to be heard prior to being required to forfeit his liberty interest and the privacy of his financial situation. Furthermore, the inmate has no opportunity for a hearing to contest the determination of the Department of Corrections of the average per diem subsistence cost at fourteen dollars and sixty-four cents ($14.64). Several questions could be raised as to the determination of that subsistence cost. For example, those inmates who work on road camps perform services for the citizens of the State of Florida

which greatly exceed fourteen dollars and sixty-four cents ($14.64). Should they be charged anything? Those inmates at community correctional centers receive minimal supervision. Should they be required to pay the burden of the supervision required of those who are on death row? Should those at minimum security facilities have the same per diem subsistence cost as those in maximum security facilities? Should the young and vigorous be required to share the cost of housing and treating the aged, the ill, and the lame? Should certain services of the Department of Corrections be taxed to the incarcerated, such as research, public relations and legal? In the context of §944.485, F.S., there is no opportunity to raise those types of questions. In the determination of the ultimate per

diem subsistence cost, each inmate is denied due process.

Insofar as the determination of individual assessments, the statute provides only that an inmate shall be afforded "an opportunity to present reasons for opposition to the assessment." It would appear, from a review of the rules, that there is no opportunity to appear before any hearing officer in person. A review will only be presented in writing. Does this deny due process to the illiterate?

Vagueness inheres in the law and in the rules. While both the law and rules provide for an exclusion for "the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents", there is no statement

in either the law or the rule developed from the law as to how the Department determines the needs, the liability, or potential liability.

The concept of due process would seemingly require, at one point or another, judicial review. The law does not provide for any review.

While separate and apart from the due process clauses, Article I, §§21 and 22 should be read here. The first, of course, provides that state courts shall be open to every person for redress of any injury. Section 944.485, F.S., does not provide any means of redress. Section 22 provides for a right of trial by jury. Where in §944.485, F.S., is there provided a right for trial by jury? Does the inmate who desires to avoid the filing of a financial disclosure form have

any right to a jury trial prior to losing his liberty interests? Does the inmate who fails to file a financial disclosure form have any right to a trial by jury before losing his parole eligibility? It would appear to be contemplated by the statute that an inmate who fails to pay his assessment would forfeit his right to parole eligibility. Is there any right to a trial by jury, or trial by court, before that right is forfeited? None would appear in the statute.

For the above-mentioned reasons, the Appellants contend that §944.485, F.S., is unconstitutional because it denies to them procedural due process.

IV.

D. SECTION 944.485, F.S., BY REQUIRING FINANCIAL DISCLOSURE AND CONDITIONING PAROLE ELIGIBILITY ON THE FILING OF A DISCLOSURE STATEMENT MAY BE IN VIOLATION OF INMATES' RIGHTS NOT TO BE COMPELLED TO BE WITNESSES AGAINST THEMSELVES.

It is the Appellants' position that a disclosure forced by the statute is in violation of their right to not be compelled to be witnesses against themselves, as protected by the Fifth Amendment to the United States Constitution.

If the Appellants refuse to disclose, the statute penalizes them by taking away their parole eligibility. Although it is not clear what would happen if the Appellants refused to disclose, citing the Fifth Amendment right to not incriminate oneself, a likely particular result would be to take this refusal into account in determining

future parole decisions, which are largely discretionary. The mandatory language of the statute would require the administrative body to remove parole eligibility for the failure to disclose financial information, regardless of the assertion of the Fifth Amendment right. It is well-settled that government cannot penalize a person for exercising his constitutional right not to incriminate himself. Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132 (1977); Doyle v. Ohio, 420 U.S. 610, 96 S.Ct. 2240 (1978).

Although certain governmental schemes are rightly upheld in spite of their forcing self-disclosure of potential criminal activities, California v. Byers, 402 U.S. 424, 91 S.Ct. 1535 (1971), others have been struck down,

Marchetti v. U.S., 390 U.S. 39, 88 S.Ct. 697 (1968).

In this, as in other situations concerning self-incrimination, there must be a balance sought. California v. Byers, supra; Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 76 S.Ct. 637 (1956); U.S. v. Turner, 480 F.2d 272 (6th Cir. 1973); People v. Samuel, 277 N.E. 381, 384 (N.Y. Ct. of Appeals, 1971). It is not a simple absolute matter, but, rather, depends in each case on all the circumstances, Merck & Co., Inc. v. Organic Labortories, Inc., 207 A.2d 711, 714 (N.J. 1965). The main elements to balance are the significance of the governmental interest and the likelihood of hitting upon criminal activity. U.S. v. Turner, supra. For instance, it has

been determined particularly relevant as to whether the disclosure focuses on a "highly selective group inherently suspect of criminal activities." Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79, 80 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965).

The expectation of privacy has also been mentioned as a factor, U.S. v. Turner, supra, at page 277. In the instant case, the most crucial factor is that the state can make these assessments and collections, without disclosure, and, therefore, the state's interest in disclosure is not at all strong. Furthermore, unlike Internal Revenue Service documents, the reports filed here are open to the general public. Additionally, the Appellants are clearly persons who may be forced to reveal incriminating

information. They did, and do, have the expectation of privacy concerning the details of their finances. The practical effect of the scheme is to force disclosure of information that may well be incriminating, or else take away or decrease parole eligibility. There is no compelling state interest for disclosure here. The assessments can be made without financial disclosure. In this situation, the state's interest in disclosure is slim to none.

V.

E. SECTION 944.485, F.S., VIOLATES THE FLORIDA CONSTITUTION BY GRANTING OVERLY BROAD LEGISLATIVE POWERS TO AN ADMINISTRIVE AGENCY WITHOUT SUFFICIENT OR CLEAR GUIDELINES.

The branches of government are defined by Article II, § 3, of the Florida Constitution. Legislative power cannot be delegated to other agencies. The legislature must lay down clear and specific guidelines so as not to allow agencies to act with undue discretion without guidance. Harrington & Co., Inc. v. Tampa Port Authority, 358 So.2d 168 (Fla. 1978); High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977); Husband v. Cassel, 130 So.2d 69 (Fla. 1961); State v. Fowler, 114 So. 435 (Fla. 1927).

Here, the Department of Corrections is to assess either all or a fair portion

of the subsistence cost to the inmates. This is to be based on several factors (the ability to pay, liability to the victim, and the needs of dependents). Discretion is given to the Department by use of the words "fair portion". No specific guidelines are spelled out and the agency has carte blanche in deciding what is a fair portion, based on the factors mentioned. Even to this moment, there have been no specifications or further guidelines interpreting what a fair portion is. It is clear that §944.485, F.S., is unconstitutionally vague and that it delegates to the Department of Corrections the power of assessment susceptible to discriminatory exercise. Should this court uphold the Appellants' contention in this regard, it would be acting in accord with Dickinson

v. State, 227 So.2d 36 (Fla. 1969), and Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953), which dealt with excessive delegations of legislative authority.

In Dickinson, the court considered a challenge to a statute which delegated to the Comptroller the authority to license cemetary operators. The statute directed him to investigate the need for a cemetary in the community in which it was to be located. Section 559.39(2), F.S. (1967). This Court held that the absence of a suitable definition for two (2) critical terms, "need for a cemetary" and "need for further facilities", rendered the Comptroller's licensing authority susceptible to arbitrary application and, thus, required the invalidation of his licensing authority.

The Drexel case involved an attack upon a City ordiance by property owners where they had been denied a permit to build a parking garage. The particular ordinance provided that no garage could be constructed, except upon "approval and permit by the City Council . . . after a public hearing at which due consideration shall be given to the affect upon traffic of the proposed use . . . ." Drexel, supra, at 318. This Court found the ordinance to be invalid for lack of adequate standards to guide the exercise of administrative discretion.

Recently, in Harrington & Co., Inc., supra, this Court had reason to address the legislative authorization to Port Authorities to

> Grant such number of licenses to competent and trustworthy persons to act as stevedores in

> the port and harbor . . . as it may deem necessary, having due regard to the business of the port and harbor.

§310.28, F.S. (1973). This Court, after reviewing the statute and staying in dictum, the related enactments may be read together with a particular statute so as to cure ambiguities or omissions, said:

> [T]he fact remains that the Legislature has nowhere provided the clear and specific guidelines necessary to insure that those licensed to perform these functions are not arbitrarily selected. This delegation of undefined power by the Legislature is tantamount to an abdication of its law-making responsibility, and cannot stand in the face of Article III, §1, of the Florida Constitution.

In High Ridge Management Corp., supra, this Court emphasized the need for a statutory provision to contain objective guidelines and standards. Where are

the objective standards and guidelines in §944.485, F.S.? What factors are to be used in determining the daily subsistence cost? What factors and objective guidelines are available to determine the needs of one's dependents, or the potential liability of the inmate to his victim? Without such guidelines, §944.485, F.S., must be declared invalid as an unconstitutional delegation of legislative power.

VI.

CONCLUSION

There are some questions which have not been addressed here. The reason that they have not been addressed is that the facts are not clear. The statute is vague. What happens to an inmate who fails to pay his assessment? Is he kept in prison? Does he forfeit his eligibility for parole? If that is the case, there may be a violation of Article I, §11, of the Constitution of Florida whereby "no person shall be imprisoned for debt . . . ." Furthermore, without more specifics, there may be a violation of Article I, §17, which prohibits the imposition of excessive fines and cruel or unusual punishment. No facts have been developed before the Circuit Court to determine if such would be the case

in the instant situation. Nonetheless, it is clear from the aforegoing argument that §944.485, F.S., carries with it serious doubts as to its constitutionality. The Appellants will contend, based on the aforegoing arguments, that §944.485, F.S., is invalid for (a) its invasion of the privacy interests of the Appellants when alternative measures are available that are less restrictive and drastic, (b) with regard to those whose crimes predate the effective date of the Act in question as an ex post facto law, (c) as a deprivation of property and liberty interests without providing procedural due process, (d) as a violation of the Appellants' rights not to be compelled to be witnesses against themselves, (e) as a violation of the Florida Constitution, inasmuch as it amounts to an unconstitu-

tional delegation of legislative power to the Department of Corrections.

For the foregoing reasons, the Appellants respectfully request this Court to declare §944.485, F.S., invalid.

Respectfully submitted,

s/ Ben R. Patterson
Attorney for Appellants

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of the following supplemental authority in connection with their claim that the act violates the ex post facto prohibitions of the state and federal constitutions: Rodriguez v. State, 380 So.2d 1123 (Fla. 2d DCA 1980) and Williams v. State, 383 So.2d 722 (Fla. 1st DCA 1980), question certified.

Respectfully submitted,

s/ Jerry G. Traynham
Counsel for Appellants

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

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LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of their reliance upon the case of Joseph Vitek, etc., et al, v. Larry D. Jones, ___ U.S. ___, 48 L.W. 4317 (U.S. Supreme Court, March 25, 1980) as supplemental authority for their position in this appeal. The State of Florida had argued that a prisoner's constitutional rights are diminished by his status as a prisoner, virtually across the board. We submit that the U.S. Supreme Court's decision in the cited case establishes

unequivocably that a diminuation of civil rights to prisoners may be decided only after careful analysis and on a case by case basis. We continue to adhere to our position that a procedural protection of the Fourteenth Amendment with respect to property rights has never been held by any court to be diminished by status as a prisoner, and that the cited case establishes that the procedural protection of liberty under the Fourteenth Amendment may be diminished only in narrowly defined circumstances where that diminuation is necessary to effect the terms of imprisonment.

Respectfully submitted,

s/ Jerry G. Traynham

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

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_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Come now the Appellants, by and through the undersigned counsel, and submit their notice of reliance upon supplemental authority not cited in their brief, pursuant to Rule 9.210(g), Fla. R. App. P., as follows:

1. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978).

2. Barry v. Barchi, 47 U.S.L.W. 4812 (1979).

Respectfully submitted,
s/ Jerry G. Traynham

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

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LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of supplemental authority. On November 10, 1980, the United States Supreme Court decided Hughes v. Rowe, No. 79-6000, 49 U.S.L.W. 3346.

Respectfully submitted,

s/ Jerry G. Traynham

[Certificate of Service omitted].

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.
_____/

MOTION FOR REHEARING

Appellants move the Court for an order granting rehearing of the substantive issues in this case, and state:

1. The Court rejected Appellants' position regarding disclosural privacy, premised entirely upon its recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379

So.2d 633 (Fla. 1980).[1] Since this Court's decision, the citizens of the State of Florida have adopted a constitutional amendment securing the right of privacy to "[e]very natural person."[2]

The statute under attack and its implementing rules are of continuing validity; if invalid, the Appellants are entitled to prospective relief. Since the people of Florida have injected into

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[1]"The issue of disclosural privacy is foreclosed by our recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), quashing the lower court's decision on which appellants rely." Opinion, at 2.

[2]"Right of Privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access of public records and meetings as provided by law." ARTICLE I, DECLARATION OF RIGHTS, Section 23.

the Constitution that which the Court found lacking, we urge rehearing and rebriefing of the privacy issue.

On rehearing, Appellants would argue that the right of privacy has been elevated by Constitutional amendment to a fundamental right, which government may infringe, if at all, only by the least intrusive means. The statute under attack, and implementing rules, utilize the most intrusive means; certainly disclosure is necessary only by those who seek to avoid paying the costs of subsistence.

2. In dismissing Appellants' procedural due process arguments, the Court entirely misapprehended the claims of deprivation of a property interest without procedural due process. The Court disposed of the liberty interest argument

by noting there is not a protected liberty interest in parole, but apparently misapprehended that Appellants also argue parole is "property".[3]

Not so.

The property referred to by Appellants is the subsistence costs which the statute compels them to pay. The required payments are property. There is no judicial authority for limitations on the procedural protections afforded prisoners' property. Where property is taken by government, a full panoply of due process rights are required in an evidentiary hearing at some stage of the proceedings.

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[3]"Appellants' procedural due process arguments presume a deprivation of liberty or property, but parole is neither." Opinion at 2,3.

In the case of each assessment made by government, there will be disputed questions of fact regarding what are subsistence costs, a prisoner's fair share, his ability to pay, his potential liability or liability to crime victims, the needs of his dependents, the nature, interest and liquidity of his assets, and many others.

Neither the statute under attack, nor the implementing rules (of which the Court has taken judicial notice in its Opinion)[4] afford any right to Appellants or other prisoners to challenge any of the issues set forth above in an evidentiary hearing at any stage of the

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[4]See Opinion at 2, note referencing Florida Administrative Code Rule 33-17.

proceedings, or, indeed, in any meaningful fashion.[5]

3. In disposing of Appellants' arguments regarding ex post facto laws, the Court overlooked the critical distinction between requiring a prisoner to pay the cost of his own subsistence, and requiring a prisoner to pay a pro rata share of the maintenance of the entire

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[5]The situation is aggravated by the exclusions of Chapter 120. The individual decisions made by the Department of Corrections on a continuing basis with regard to how much each prisoner will be required to pay are surely decisions affecting the substantial interest of prisoners in their property, and in the taking of their property by the state, yet a due process hearing is denied. §120.52(10), Florida Statutes, provides in part:

> * * * Prisoners as defined in s944.02(5), shall not be considered parties for the purposes of obtaining proceedings under s120.54(16)or s120.57, . . .

prison system. We argue the former may be permissible under extant case law, but the latter is clearly a "fine" intended for financial support of the entire system.[6] This distinction is critical, and we believe the Court overlooked it.

4. We do not believe the Court misapprehended the balance of our arguments; their absence here is not abandonment.

Wherefore, the Appellants urge the Court to grant rehearing, and, if necessary, rebriefing, for the reasons stated above.

Respectfully submitted,
s/ Jerry G. Traynham

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[6]In fact, the statute is quite imprecise upon the distinction. A strict reading of it requires a prisoner to pay only his own subsistence costs, while the Department of Corrections in its implementing rules has opted for requiring a prisoner to pay a pro rata share of the maintenance of the entire prison system, less new capital.

[Certificate of service omitted.]

§944.485, Fla.Stat. (1979)

Department to adopt plan for subsistence fees with respect to certain prisoners; time of adoption; requirements.--

(1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside the correctional system, which may include bank accounts, inheritances, real estate, social security payments, veteran's payments, and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state, each prisoner in the state correctional system, except those who have entered into an agreement under s.947.135 prior to October 1, 1978:

(a) Shall disclose all revenue or assets as a condition of parole eligibility.

(b) Shall pay from such income and assets, except where such income is exempt by state or federal law, all or a fair portion of the prisoner's daily subsistence costs, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents.

(2) Any prisoner who is directed to pay all or a fair portion of daily subsistence costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment.

(3) The department shall promulgate, within 90 days of October 1, 1978, rules which implement this section.

§945.10, Fla.Stat. (1979)

Investigations; information confidential.--

(1) Except as provided below, information in a presentence investigation report made by the Department of Corrections shall be confidential and shall be available only to officers and employees of the court, the Legislature, the Parole and Probation Commission, the Department of Health and Rehabilitative Services, the Department of Corrections, and public law enforcement agencies in the performance of a public duty or, with the written permission of the Department of Corrections, to parties establishing legitimate research purposes. The Department of Corrections shall promulgate rules and regulations stating what portions of its files, reports, or

records are considered confidential and subject to restricted view. The Department of Corrections shall promulgate rules and regulations to prevent the disclosure of confidential information to unauthorized parties, except as provided above. However, nothing in this subsection shall alter other provisions of the law relating to the accessibility of inmate records.

(2) No inmate of any institution, facility, or program of the Department of Corrections shall have access to any information contained in the files of the department. The department shall restrict release of information to any person except members of the news media and those listed in subsection (1) when there is reasonable cause to believe that such person may divulge such information to

the inmate.

(3) The Department of Corrections and the commission shall mutually cooperate for the proper performance of the respective functions of each agency.

RULE 33-6.06, FLA.ADMIN.CODE (FROM CH. 33, FLA.ADMIN.CODE, "RULES OF THE DEPARTMENT OF CORRECTIONS".)

Confidential Records.

(1) No inmate of any institution, facility, or program shall have access to any information contained in the files of the Department.

(2) The following are authorized to review the records of the Department without restriction: The Governor, members of the Cabinet, officers and employees of the court, the legislature, the Parole and Probation Commission, the Department of Corrections, and public law enforcement agencies in the performance of a public duty.

(3) Members of the news media are authorized to review the records of the Department of Corrections except for information in the presentence investiga-

tion or other information deemed confidential by the Department. All confidential information shall be removed from the files of the Department prior to such review.

(4) Legitimate researchers are authorized to review the records of the Department except for information in the presentence investigation or other information deemed confidential by the Department. The latter may be reviewed with written permission from the Commission.

(5) When it is reasonably believed that any other person other than those in (2), (3) and (4) above may divulge information contained in the files of the Department to an inmate, the Department shall restrict release of any information to such person.

(6) Content of Files. Each inmate

record will contain the following documents and information which is inserted in chronological order as follows:

(a) Uniform commitment.

(b) Indictment by Grand Jury or information filed by State's Attorney.

(c) Judgment and sentence of court.

(d) Sheriff's certificate.

(e) Court order altering sentences when applicable.

(f) Photograph and identification sheet.

(g) Classification and admission summary.

(h) Presentence and post-sentence investigation.

(i) Chronologically, by date and document, of all subsequent official documents pertaining to the inmate, such as progress reports, correspondence,

investigations and other pertinent information to the individual case.

(7) All community supervision files shall be deemed confidential and are exempt from the provisions of 33-6.06(3) above. Such case files shall be available only to the members of the Florida Parole and Probation Commission, its employees and employees of the Department provided, however, that information compiled by the Department in the presentence investigation report shall be available to parties specified in Section 945.10, Florida Statutes. This confidentiality is not intended to prevent the use of the file material in management information system or to limit the dissemination of information to other criminal justice system agencies approved by the Department.